

SUPREME COURT

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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-78

APPEALERS: URB. CHIEFS OF THE STATE OF UTAH,
ET AL., PETITIONERS

UNITED STATES OF AMERICA

ANTHA REYON, ET AL., PETITIONERS

FIRST NATIONAL BANK OF UTAH, N.A.
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WRITING FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1331

**AFFILIATED UTE CITIZENS OF THE STATE OF UTAH,
ET AL., PETITIONERS**

v.

UNITED STATES OF AMERICA

ANITA REYOS, ET AL., PETITIONERS

v.

**FIRST SECURITY BANK OF UTAH, N.A.,
UNITED STATES OF AMERICA, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals in these consolidated cases are separately reported at 431 F. 2d 1337 and 1349 and are set forth at pages 99-121 and 122-125 of the Appendix to the petition.

JURISDICTION

The judgments of the court of appeals were entered on June 19, 1970. Timely motions for rehearing were denied on November 12, 1970. The petition for a writ of certiorari was filed on February 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether after termination of federal supervision over certain Indians and of restrictions on their property the United States has a continuing duty, for purposes of tort liability, to advise them with respect to sales of their stock in a corporation formed by them to manage tribal mineral rights.

2. Whether under 25 U.S.C. 345 the United States has consented to a suit to compel the conveyance to certain terminated Indians of an undivided 27 percent interest in the mineral estate of a reservation, which interest is presently distributed to individual Indians through shares of a corporation responsible for jointly managing the estate.

STATUTES INVOLVED

The relevant provisions of the Ute Termination Act, 25 U.S.C. 677-677aa, are set forth at pages 126 to 143 of the Appendix to the petition. Set forth in an Appendix to this brief, *infra*, p. 11, is 25 U.S.C. 345.

STATEMENT

The Act of August 27, 1954, 68 Stat. 868, 25 U.S.C. 677-677aa, provided for partition of the assets of the

Ute Indian Tribe between the mixed-blood¹ and full-blood members of the Tribe² and for termination of federal supervision over the trust and restricted property of the mixed-blood members (Sec. 677). The mixed-bloods were permitted to form an organization for the purposes of carrying out the provisions of the Termination Act. 25 U.S.C. 677e. Affiliated Ute Citizens of the State of Utah (hereinafter Affiliated Ute) was formed by them in 1956 for that purpose.

In 1958 the mixed-bloods formed the Ute Distribution Corporation (hereinafter the Corporation)³ in order to have distributed to them their share of tribal assets such as oil, gas, and mineral rights that were not easily divisible (Pet. App. 4-5).⁴ The Corporation issued 4900 shares of stock, 10 to each mixed-blood Ute (Pet. App. 5). On December 31, 1958, the Corporation and the First Security Bank of Utah entered into an agreement under which the Bank became the transfer agent for the stock and held physical possession of the stock certificates (Pet. App. 8-9).

In accordance with 25 U.S.C. 677n, the Corporation's articles of incorporation included a provision

¹ "Mixed-blood" means a member who possesses less than one-half Ute Indian blood, or a total of one-half or less of Indian blood. 25 U.S.C. 677a.

² The division was based upon a 27 percent share to the mixed-bloods.

³ On November 1, 1958, the Corporation's Articles of Incorporation were submitted to and approved by Affiliated Ute, Resolution No. 58-C-5.

⁴ The Corporation was to manage these interests jointly with the Tribal Business Committee of the full-blood Utes (Pet. App. 101).

that, prior to August 27, 1964, shares could not be sold unless first offered to members of the Tribe in a form approved by the Secretary (Pet. App. 105-106). If no member of the Tribe wished to buy, the shares could be sold to others, but only at a price not less than that stated in the offer to the Tribal members. The seller was required to furnish an affidavit to the Superintendent of the Reservation, stating the amount he received in the sale of his shares to a nonmember of the Tribe (Pet. App. 108). 25 C.F.R. 243.8 (1967 Rev.).

After removal of the restrictions on the property of each individual mixed-blood, the Secretary was required to publish a proclamation in the Federal Register that the federal trust relationship to that individual was terminated. "Thereafter, such individual shall not be entitled to any of the services performed for Indians because of his status as an Indian." 25 U.S.C. 677v. The proclamation was published on August 26, 1961 (26 Fed. Reg. 8042).

In the *Rejos* case, certain mixed-blood Indians sold 122 shares of their stock to various non-Indians (two of the non-Indians involved were employees of the defendant bank). The purchase prices, as reported in the affidavits submitted by the sellers, ranged from \$300 to \$600; the sellers' affidavits also stated that they had received this amount in cash. (Pet. App. 114-116.) These sales took place after termination and removal of restrictions on the mixed-bloods' property. The individual Indian sellers sued the United States under the Tort Claims Act on the ground that the government had violated a fiduciary

duty by permitting the sale of the stock at less than its fair market value.

In the *Affiliated Ute* case, suit was filed against the United States seeking distribution of 27 percent of the mineral estate underlying the reservation to the individual mixed-bloods and a determination that plaintiff Affiliated Utes is entitled to manage the property jointly with the Ute Tribal Business Committee. Jurisdiction was sought to be invoked under 25 U.S.C. 345 and 28 U.S.C. 1399 and 2409.

The district court in the *Affiliated Ute* case concluded that it had no jurisdiction because the suit was barred by sovereign immunity (Pet. App. 124). In the *Reynos* case, the district court found that the government, through its employees, had reasonable cause to know that the mixed-bloods were selling their stock to non-Indians for less than fair value under circumstances of a doubtful nature, that the government owed a duty to the sellers to prevent these sales, and that the government's failure to act was the proximate cause of the sales (Pet. App. 82-84, 106-107). The court concluded that the government had been negligent and awarded damages based on a fair value of \$1,500 per share (Pet. App. 97, 121).

The court of appeals affirmed in *Affiliated Ute Citizens* on the grounds that the suit was an unconscionable suit against the United States and that 25 U.S.C. 345 (waiver of consent with respect to allotment claims) and 28 U.S.C. 1399, 2409 (waiver of consent where the United States is a joint tenant or tenant in common) were inapplicable (Pet. App. 124-125).

The court of appeals reversed in *Reynos* on the basis of the Ute Termination Act, 25 U.S.C. 677 *et seq.*, holding (Pet. App. 109-110):

The statute expressly provides for termination of the Government's relationship with the individual mixed-bloods. The provisions are clear and the termination was accomplished and is final. It is clearly within the power of Congress and no one else to provide for such an end to the relationship between these individuals and the Government. *United States v. Waller*, 243 U.S. 452; *United States v. Nice*, 241 U.S. 591; *Tiger v. Western Investment Co.*, 221 U.S. 286. It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination.

* * * *

The trial court was thus in error in concluding that "limited aspects of the federal trust relationship continued," or that any form of wardship continued, and thus that some duty on the part of the Government to the plaintiffs continued after termination in connection with their sales of UDC stock. There being no duty the trial court was in error in awarding damages against the United States under the Tort Claims Act.

The court's further holdings with regard to the claim that the defendant bank was liable for its agents' alleged violation of Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. 240.10b-5) are not relevant to the claims against the United States.

ARGUMENT

Both decisions are correct with respect to the claims against the United States, no conflict is presented, and neither decision presents an important question warranting review by this Court.

No one questions the rights of the Affiliated Ute Citizens to their 27 percent beneficial interest in the minerals of the reservation. Contrary to petitioners' assertion (Pet. 9-10), these rights are not rendered illusory by the court of appeals' conclusion that petitioners are not entitled to a separate conveyance (apart from the stock) of that interest (Pet. App. 125). Since petitioners are not seeking "possession" of any parcel of land to which they are entitled by an Act of Congress, they do not come within the consent to suit provided in 25 U.S.C. 345, and the court of appeals properly held that there was no jurisdiction (Pet. App. 125).⁵

Similarly, the court of appeals rightly concluded that the Termination Act, 25 U.S.C. 677 *et seq.*, terminated the prior relationship between the Indians and the United States before the stock transactions occurred and that the right of other members of the Tribe to first refusal for sales of this stock did not create any "restricted property," as that phrase is used with respect to Indian property, which might have extended the fiduciary relationship beyond the termination date. The court did not, as petitioners contend (Pet. 12-14), hold that the right of refusal

⁵ Petitioners have apparently abandoned the assertion of jurisdiction under 28 U.S.C. 1399 and 2409.

existed only in the Tribe. Rather, the court recognized that this right "was granted clearly to permit the members of the Tribe, the Tribe, or the full-blood members to have the first right to purchase property which was about to be sold to an outsider" (Pet. App. 108). This method of benefiting the full-blood members of the Tribe, who had not been terminated, created no duty on the part of the government with respect to the mixed-blood Utes, who had been terminated and who were attempting to sell their stock. The court of appeals was correct in so holding (Pet. App. 108-109), and its decision is not inconsistent with the quite different cases of *Menominee Tribe v. United States*, 391 U.S. 404; *Klamath and Modoc Tribes v. Maison*, 338 F.2d 620 (C.A. 9); and *Crain v. First National Bank of Oregon, Portland*, 324 F.2d 532 (C.A. 9).⁶

We note, in conclusion, that over the last decade the trend in Congress has been against following a policy of termination. The special situation here is thus unlikely to arise again in the foreseeable future.

⁶ *Menominee* and *Klamath* dealt solely with the effect of termination on treaty rights. In *Crain*, the Secretary of the Interior, pursuant to the applicable Termination Act, had established a trust over property of certain terminated Indians who were found to be in need of assistance with their affairs. The court held that this was not a violation of the Indians' Fifth Amendment rights because Congress had the power "to determine whether emancipation should be complete or only partial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1971.

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APPENDIX

25 U.S.C. 345 provides:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

